

No. 16,085

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	} <i>Appellant,</i>
vs.	
EUGENE C. DREW,	

On Appeal from the United States District Court
for Northern District of California,
Southern Division

BRIEF FOR APPELLANT UNITED STATES

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FILED

JUN 17 1959

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JURISDICTION

The jurisdiction of the District Court is founded upon Article III, Section 2 of the United States Constitution, 28 U.S.C. § 1333(1) and R.S. 4604, as amended (cf. 46 U.S.C. § 706) and was invoked by a seaman's petition (R. 3) for the setting aside of a forfeiture for desertion and restoration of the forfeited wages deposited in the registry of the court.

The jurisdiction of this Court rests upon 28 U.S.C. § 1292(3), by reason of a notice of appeal (R. 12)

filed June 30, 1958 from an interlocutory decree ("Order", R. 11) passed June 30, 1958, ordering the restoration of a portion of the forfeiture, and upon 28 U.S.C. § 1291, by reason of a notice of appeal (R. 18) filed February 25, 1959, from a final decree ("Order Setting Aside Forfeiture", R. 16) passed January 7, 1959, ordering the restoration of the remainder of the forfeiture.

STATEMENT OF THE CASE

The Petitioner Drew signed on the S.S. Mormacgulf as a wiper at San Francisco, California, July 16, 1957 (R. 3, 40). He appears to have been a thoroughly unprepossessing sailor (R. 76-77). Not only did he drink excessively, by his own admission (R. 26, 28), but before his desertion he had already missed his ship at Panama (R. 26) and, at La Guaira, Venezuela, had threatened the master to sabotage machinery if the master did not lend him money (R. 27-28, 45-46).

At Port of Spain, Trinidad, on August 14, 1957, the master had granted liberty to the crew (R. 53). The sailing time was 6:00 p.m. (1800) (R. 53, 90) and it was posted in accordance with custom on the sailing board at least 8 hours before sailing time (R. 78-79, 83-84). Liberty expired and the crew were supposed to be back aboard one hour before sailing (R. 84) as Drew knew (R. 27).

On that day, about 1:30 p.m., Drew presented himself in the master's cabin and demanded that the master give him money (R. 51). A little later he

appears to have tried unsuccessfully to sell his spare clothes, and then thrown them overboard (R. 56, 68, 89). Still later he struck up an acquaintance with an unidentified man on the pier and made two or three trips on board to get bags of sandwiches which he took for the man on the pier to eat (R. 68-69, 77-79). During this period he has been described as acting as though he had been drinking (R. 89, 91) but was not "very intoxicated" (R. 92).

About a half hour before sailing time, Drew and his unidentified companion had started walking up the pier, away from the ship, when the local agent for the ship drove onto the pier, stopped, and talked with Drew, pointing down the pier in the direction of the gangway. Drew turned around and started toward the gangway, while the agent drove on a little past the gangway. When Drew saw the agent well clear, he turned and ran up the pier again and around the corner of a warehouse, in the general direction of the uptown area, and he was not seen again (R. 69-70, 79-83, 87-89). A search disclosed none of his clothes and effects left aboard (R. 71-74) and when the ship sailed without him he was logged as a deserter (R. 4, 46-47). He was subsequently returned to the United States on another vessel under consular requisition (R. 4).

Although Drew now claims illness as an excuse, medical attention was available to him in Port of Spain (R. 85) by application to the chief mate ("first mate") a procedure that Drew admits he knew (R. 26). Although he now asserts the contrary, he never

asked the chief mate or the master for medical attention on this occasion or on any other except once in San Pedro for tooth trouble (R. 47, 64-66). The chief mate was available for such a request, if Drew had wished to make it (R. 75, 88, 92). If Drew had any physical complaint at all, he admits it was nothing more than "nerves" (R. 25, 35), presumably the result of excessive drinking (R. 24-26). The record contains no evidence nor even claim that Drew sought any medical attention in Port of Spain, nor until after his return to the United States, when he says that he consulted a doctor at the Marine Hospital who appears to have advised him that his trouble was alcoholism (R. 24, 28).

Drew filed his petition June 25, 1958 (R. 3) claiming that the entry of desertion was erroneous and seeking to have the forfeiture of his wages set aside. The United States filed its claim (R. 6) and answer (R. 7) and the petition was called up for hearing on June 30, five days after it was filed (R. 19). Although the Government had had no opportunity to investigate and prepare, it consented (R. 20) to go forward to the extent of receiving the petitioner's own testimony at that time for his own convenience. Despite a complete lack of evidence at that hearing (R. 19-36) tending to show that the log entry was erroneous, the court, apparently relying in part upon certain statements about actions of the United States Coast Guard (R. 29-30, 33-34) and in part upon the consideration that the petitioner "probably needs it" (R. 30) ordered two-thirds of the forfeiture remitted reserving

only the remainder until the time of hearing any contrary evidence produced by the Government (R. 11).

The Government immediately appealed to this Court (R. 12). Despite the appeal which had been taken, the court below paid out the funds in accordance with its order (Unanswered Request for Admission of Facts, R. 17). Thereafter, in order to avoid piecemeal appeals, this Court, retaining jurisdiction, remanded for the completion of the case below (R. 13-15). After remand, the depositions of the master (R. 36) and chief mate (R. 58) were introduced on behalf of the Government and the cause submitted after which the court below, without findings of fact, ordered the remainder of the forfeiture remitted (R. 16) and the Government appealed (R. 18) from that order as well as the earlier one.

Despite the small amount of money involved, the Government considers this case a particularly appropriate one for appeal in view of the number of points presented by the record as to which appellate guidance should be given the district courts.

SPECIFICATION OF ERRORS

The following errors are relied upon by Appellant:

1. In making its Order filed June 30, 1958 remitting two-thirds of the forfeiture and so deciding the case, the District Court erred in failing to find the facts specially and state separately its conclusions of

law thereon and failing to make any findings of fact or conclusions of law at all in support of the said order, all contrary to Admiralty Rule 46 $\frac{1}{2}$.

2. In making its Order Setting Aside Forfeiture filed January 15, 1959, and so deciding the case, the District Court erred in failing to find the facts specially and state separately its conclusions of law thereon and failing to make any findings of fact or conclusions of law at all in support of the said order, all contrary to Admiralty Rule 46 $\frac{1}{2}$.

3. In deciding the case without any evidence that Petitioner-Appellee intended to return to the vessel, the District Court erred in failing to require Petitioner-Appellee to bear his burden of proving that the master's log entry of desertion which effected the forfeiture, was erroneous.

4. In deciding the case as to remission of two-thirds of the forfeiture by its Order of June 30, 1958 without evidence of extenuating circumstances, the District Court erred in failing to require Petitioner-Appellee to bear his burden of proving such extenuating circumstances, if any existed.

5. The District Court erred in granting the petition in the absence of evidence that Petitioner-Appellee did not desert and that the master erroneously entered his desertion in the log, as claimed in the Petition, and the granting of the Petition was clearly erroneous.

6. The District Court erred in failing to hear the evidence of Respondent-Appellant before deciding the case as to remission of two-thirds of the forfeiture.

7. The District Court erred and abused its discretion in deciding to remit two-thirds of the forfeiture in the absence of evidence of extenuating circumstances attending the desertion.

8. The District Court erred and denied Appellant due process of law in deciding the case or a part of it only five days after the Petition was filed and without proper notice and opportunity for Respondent-Appellant to investigate and prepare its case and present evidence in its defense.

9. The District Court erred in ordering the payment of and paying two-thirds of the forfeiture, pursuant to its Order of June 30, 1958, subsequent to the taking of an appeal from such order, without jurisdiction to do so and in violation of the stay imposed by such appeal and of the jurisdiction of the Court of Appeals by reason of such appeal.

SUMMARY OF ARGUMENT

The court below made no findings of fact or conclusions of law, as required by the rule, and its orders deciding the case stand unsupported by essential findings and must be reversed for this alone. But, moreover, the court below could not have made, upon the record in this case, the necessary finding that Petitioner-Appellee intended to return to his vessel and therefore was not a deserter. In setting aside the forfeiture, the court below failed to require the Petitioner-Appellee to bear his burden of proof that the

log entry was erroneous, since the record is actually barren of any substantial evidence to that effect and, on the contrary, shows clearly by the Petitioner-Appellee's own statements and conduct the correctness of the entry. The Petitioner-Appellee's drinking and consequent "illness" constitute, under the authorities, no excuse for desertion. The court below improperly considered statements and speculation about Coast Guard proceedings, the results of which are not even admissible, much less competent to affect the court's decision.

In addition, the court below should be corrected as to procedure, for its guidance in future cases. It is improper to hear these adversary proceedings on short notice, without opportunity to the Government to investigate and take testimony, if necessary, from witnesses, some of whom are all too likely to be out of the country; such procedure is a denial of due notice and opportunity to defend. It is improper to decide any part of the case and to remit even part of the forfeiture after hearing only one side of the case; such procedure is not the exercise of legal discretion but simply arbitrary conduct. Finally, it is improper to pay out the funds after notice of appeal, since the appeal stays the case and transfers jurisdiction of the res to the Court of Appeals.

ARGUMENT

I. THE DECREES BELOW ARE INVALID FOR LACK OF ANY FINDINGS OF FACT TO SUPPORT THEM

The orders of the District Court disposing of the forfeited funds in this case are completely unsupported by findings. Nor is this a case in which there are merely inadequate findings; there are simply none at all. Admiralty Rule 46 $\frac{1}{2}$ provides:

“In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49.”

Although it has been the practice of the court below to make findings and conclusions as required by the rule in these cases,¹ the requirements of Rule 46 $\frac{1}{2}$ were completely disregarded here. Decrees unsupported by findings cannot stand. *Victory Towing Co. v. Bordelon*, 219 F.2d 540, 1955 A.M.C. 553 (5th Cir.); cf. *The Silverpalm*, 79 F.2d 598, 1935 A.M.C. 1506 (9th Cir.).

Vague, general statements, operating by implication or reference, even if there were any, would not comply with the rule, which requires that “Findings of Fact should be clear, coherent and self-sustaining.” *The Plow City*, 122 F.2d 816, 819, 1941 A.M.C. 1564,

¹See, e.g., *Petition of Scott*, 143 F.Supp. 175, 177, 1956 A.M.C. 2160, 2163 (N.D.Cal.); *Petition of Ritchie*, 130 F.Supp. 645, 647 (N.D.Cal. 1955).

1569 (3rd Cir.). This Court has laid down the standard for findings of fact in *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955), as follows:

“The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court’s decision, and to enable it to determine the ground on which the trial court reached its decision.”

In the *Irish* case, the weakness of the findings was that they gave “no hint as to the factual basis for the ultimate conclusion.” Here, where no findings and conclusions were made at all, the decrees stand unsupported and must be reversed.

II. THE COURT BELOW ERRED IN FAILING TO REQUIRE THE PETITIONER-APPELLEE TO BEAR HIS BURDEN OF PROOF

A. Petitioner-Appellee Had the Burden of Proving That the Master Erroneously Made an Entry of Desertion

The Petitioner-Appellee, coming to court for affirmative relief, had the same burden of proof that any party seeking such relief has, to prove the allegations on which his claim to relief is based. We would not have supposed there was any doubt of this and we do not understand that the Appellee actually contends otherwise, but the lower court’s expressions in conducting the case and its ultimate determination of the case leave little doubt that the court did not view the Petitioner-Appellee as having the burden of proving his claim.

The Appellee, by his Petition below, sought to set aside an accomplished forfeiture for desertion. The penalty of forfeiture is provided in R.S. 4596 (as amended, 46 U.S.C. §701) (Appendix B) and the procedure of making that penalty effective is provided in R.S. 4597 (as amended, 46 U.S.C. §702) (Appendix B) and R.S. 4604, as amended (Cf. 46 U.S.C. §706) (Appendix B). Under that procedure the forfeited funds were deposited in the registry below. R.S. 4604, in providing for such deposit of "wages which . . . are forfeited for desertion", leaves no doubt of the character of the forfeiture as an accomplished fact, by reason of the log entry, subject only to the right of the seaman to petition the court under Admiralty Rule 42 and attempt to show that the log entry was erroneous. The log entry is therefore not a mere "charge", as the judge below regarded it (R. 20), nor merely evidence of desertion, although it is that, also.² It is a legal act, analogous to a judgment, required by the statute and producing the legal consequence of working forfeiture under the terms of the statute.

Of course the Petitioner-Appellee had the burden of proving his contention that the log entry was erroneous, as, in his Petition, he prayed the court to determine (R. 5). Under the statute, and in accordance with authorities already cited, the forfeiture was ac-

²The log entry is "prima facie evidence" (proof) of desertion. *Douglas v. Eyre*, 7 Fed. Cas. 975, 978, No. 4,032 (E.D.Penn. 1830) ("But I hold the entry itself to be prima facie evidence of its truth in every particular; and to be falsified it must be disproved by satisfactory evidence."); *The Philadelphia*, 23 Fed. Cas. 1069, 1070, No. 13,973 (D.Penn. 1805).

complished by the master's entry of the desertion in the official logbook. The Petitioner below sought to have the forfeiture set aside by proving that the log entry was erroneous, i.e. by proving that he did not in fact desert. Desertion is not just a defense to his claim; the erroneous character of the entry, which is to say, the fact that he did not desert, if true, is the essential element of his cause of action. Like any other plaintiff or petitioner he must, of course, both plead and prove the elements of his claim. In this he is not aided by any presumption, for in addition to the log entry's being a legal act working a forfeiture, as contrasted with mere evidence, it is an entry required by law in an official record³ and, as such, has every presumption in its favor.

The burden of proof which petitioner, like any other plaintiff, must bear, rests not only upon the universal rule of procedure in this respect but also upon particular grounds of reason in this class of cases. The deserter is the only person with detailed knowledge of his own actions and motivations. Here, as in many other instances, such as cargo cases and bailment cases generally, as well as *res ipsa loquitur* cases, reason imposes the burden of showing the truth upon the party having the unique opportunity of knowing it and being, therefore, in the best position to prove it.⁴

³See R.S. 4290 (as amended, 46 U.S.C. §201) and R.S. 4597 (as amended, 46 U.S.C. §702).

⁴Justice Story, in passing upon the evidence and upholding a forfeiture for desertion, said of the seaman's failure to bring forward proof of his case, that "it was peculiarly within his privity and knowledge how the matter stood." *Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1191, No. 2,948 (C.C.Mass. 1844).

Not only have the lower courts regularly recognized that the burden of proof lay with petitioner⁵ but this Court itself has so recognized in *Humes v. Alaska Transportation Company*, 180 F.2d 534, 1950 A.M.C. 508 (9th Cir.) (No. 12,038). Although the opinion of this Court, affirming the district court, did not discuss the burden of proof, the district judge at the outset of his decision in the *Humes* case (*Humes* Apostles on Appeal 3) imposed the burden on Humes and found he had not sustained it, and the burden of proof was one of the issues on appeal briefed by both Humes and the United States, as shown in the records of this Court.

⁵*Petition of Sanuiti*, 124 F.Supp. 69, 1954 A.M.C. 990 (N.D. N.Y.). Courts of this circuit have repeatedly expressly held in unreported cases that the burden of proof is on petitioner. See, e.g., the findings and conclusions in the following unreported cases, certified copies of which will be submitted to the Court: *Petition of Strong*, W.D.Wash. No. 16378 (Judge Bowen); *Petition of Lydoff*, W.D.Wash. No. 16379 (Judge Bowen); *Petition of England*, W.D.Wash. No. 16347 (Judge Bowen); *Petition of Gray*, D.Ore. No. 9781 (Judge East); *Petition of Hosking*, N.D.Cal. No. 20984 (Judge Hamlin); *Petition of Gargano*, N.D.Cal. No. 20946 (Judge Goodman); *Petition of Camponeschi*, N.D.Cal. No. 20934 (Judge Carter); *Petition of Okoorian*, N.D.Cal. No. 20911 (Judge Goodman).

And the reported cases show that the petitioning seaman is treated as having the burden of proof. See, especially, *Petition of Scott*, 143 F.Supp. 175, 1956 A.M.C. 2160 (N.D.Cal.); *Ex Parte Barnes*, 1954 A.M.C. 2168 (S.D.Miss.); *In re Mitchell*, 84 F.Supp. 871, 1948 A.M.C. 1634 (D.Ore.); *Petition of Murphy*, 73 F.Supp. 710, 1947 A.M.C. 394 (S.D.N.Y.); *Petition of Magdalayo*, 1948 A.M.C. 1896 (S.D.N.Y.).

B. Petitioner-Appellee Has Failed to Bear His Burden and the Evidence Overwhelmingly Shows the Correctness of the Log Entry

1. The evidence plainly shows that Appellee intended not to return to his vessel

For conclusive evidence that Petitioner-Appellee did not intend to return we need go no further than Article 8 of the Petition (R. 4). A reading of his own words in that Article leave no doubt that he was leaving the ship without permission and without intending to sail with her or return to her. This is confirmed by all the evidence of Drew's conduct. The sailing time was posted (R. 78-79, 83-84) and it is nowhere suggested that he was not aware of it. He disposed of his extra clothes before leaving (R. 56, 68, 89) or, at any rate, left none behind (R. 71-74). When evidently urged by the agent to go aboard just before sailing time, he fled (R. 69-70, 79-83, 87-89). Except for Drew's own uncertain claim that he left some clothes aboard, all these facts stand uncontradicted. His story of illness reduces by common agreement to "nerves" or the "shakes" from excessive drinking, while his claimed requests for medical attention are completely falsified (R. 26, 47, 64-66, 75, 88, 92) and he does not even suggest that he sought any medical attention in Port of Spain from the agent, the consul or anyone else.

The most that the Appellee could really say in his behalf was this testimony (R. 23):

At that time, there was another seaman there, not from the same vessel, and I was asking him

about it. He said, "you can always rejoin your ship at the next port."

So it is my intention to rejoin it at the next port.

By what means did this seaman in Port of Spain expect to meet his vessel at Rio de Janeiro, 3000 miles away (R. 80)? And how did it come about that, instead of doing so, he applied to the American consul and had himself sent back to the United States, as a destitute seaman on consular requisition⁶ (Petition, Art. 14, R. 4)? The event proves that, if he ever entertained an intention of rejoining, he abandoned it, for the record shows no effort to carry it out. His testimony in this respect has the tone of a happy inspiration on the witness stand. Justice Story said, in *Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1190, No. 2,948 (C.C. Mass. 1844):

"... But I should go farther and say, that if, upon the eve of the departure of the ship from the port on the voyage, a seaman should, with a full knowledge of the fact of her intended departure, voluntarily or secretly without leave quit the ship that would of itself be strong *prima facie* evidence of a positive intention to desert, and it would require the fullest and clearest evidence of

⁶Transportation of destitute seamen on consular requisition is at Government expense. See R.S. 4577 (as amended 46 U.S.C. §678) and R.S. 4578 (as amended 46 U.S.C. §679). Thus Appellee's passage was presumably paid from the fund into which his forfeited wages should be deposited. See R.S. 4604, as amended (cf. 46 U.S.C. §706) and R.S. 4545 (as amended 46 U.S.C. §628).

bona fides, and sincerity of intention, to displace the presumption.”

With what is the “fullest and clearest evidence” we need not concern ourselves, for here we have no evidence whatever in Appellee’s favor and the record shows conclusively the correctness of the log entry of desertion. Indeed, the lower court’s own remarks at the hearing (R. 29-30, 33) appear to us to reveal that the judge below was not deceived and granted relief in spite of, rather than because of, his belief with regard to the issues.

2. Appellee’s drinking and consequent “illness” afford him no excuse.

This Court need look no farther than its own ruling to assure itself that drunkenness will not negate or excuse desertion. In *The Mermaid*, 115 Fed. 13 (9th Cir. 1902), the seaman became intoxicated while a visitor on a neighboring vessel. Thereafter, he refused to obey an order to return to his own ship and was logged as a deserter. The district court had determined that the shipping articles were void for indefiniteness, but added that:

“I do not regard drunkenness as any excuse for desertion, and I would not hesitate to declare a forfeiture of wages in this case, for desertion, if the libelant had bound himself by signing lawful shipping articles * * *.” (*The Mermaid*, 104 Fed. 301, 302 [D. Wash. 1900]).

Disagreeing with the lower court’s conclusion as to the lawfulness of the shipping articles, this Court re-

versed and remanded with instructions to dismiss the seaman's libel:

"We agree with the district court that drunkenness was no excuse for the conduct of [the seaman], and that his action in leaving the vessel as he did was desertion. (115 Fed. at 14).

In *The Ericson*, 8 Fed. Cas. 751, No. 4,510, (D. Cal. 1876), the seaman left his ship, without permission, "to take a drink." Subsequently, the master went ashore and found him in a dram-shop. While they were returning to the vessel in the company of other members of the crew whom the master had located, the seaman broke away and ran. Holding that he had thus forfeited his wages for desertion, the court stated:

"The natural and inevitable consequence of this was to compel the master to proceed to sea without him. He must be held to have intended what was the necessary result of his conduct. He cannot, by alleging drunkenness, or rather forgetfulness of all that occurred except his starting back, escape the consequences of his own acts. . . . His running away was under the circumstances, an act of desertion, and must have been so intended by him. Whether that intention was formed while under the influence of liquor, I consider immaterial. (8 Fed. Cas. at 752)."

The Appellee's "sickness" was shown to be no more than a feature of his drunkenness and a consequence of his own wrongdoing. But, in any event, the seaman may not, at his own discretion, break his contract whenever he feels ill. Of course, he is entitled to have

appropriate medical care furnished by the shipowner, but he is not entitled to abandon his ship merely to seek care on his own terms nor certainly because he suffers from "nerves" aboard.⁷ The matter is well put by Judge Bowen in his unpublished oral opinion in *Petition of Strong*, No. 16378 and *Petition of Lydoff*, No. 16379, W.D. Wash., May 14, 1958 (printed in Appendix C) where he says:

"Neither party to a ship's articles relating to a seaman's service on board the vessel has a right to repudiate that contract during the time it is in effect unless in the terms of the contract itself they reserve and express the right to change it and, for example, shorten the work period. No such reserved method of termination is advanced here in behalf of the petitioners, nor is there any evidence before the Court that the petitioners had a right under the contract itself or any other conceivable right to terminate their contract under the shipping articles at the time they deserted the ship.

* * *

Everyone has a warm spot in his heart for American seamen who risk the vicissitudes of a voyage, but many a seaman long before we had refrigeration on ships for all food and long before we had electric fans on board ships, long before we had proper ventilation and proper sleeping and dining quarters on board ships, as was the case in the oldtime sailing ship days honored in our early American history, when men signed on these sail-

⁷Compare cases on seamen's pleas of oppression and danger of violence as excuse, such as *Petition of Scott*, 143 F.Supp. 175, 1956 A.M.C. 2160 (N.D.Cal.) ; *The Leiderhorn*, 99 Fed. 1001 (N.D.Cal. 1900).

ing ships as members of the crew and stayed with those ships even though troubled by illnesses a great deal more aggravated than those with which these men were afflicted.”

The plea of illness was also rejected by the lower court in the decision affirmed by this court in *Humes v. Alaska Transportation Company*, 180 F. 2d 534, 1950 A.M.C. 508 (9th Cir.). The lower court’s unpublished decision⁸ reads in part as follows:

“ . . . Both parties are bound according to the terms stated in the contract. Neither is entitled to terminate the contract without just cause. That applies to both sides. These two men, in my opinion, got scared by health conditions up there and I think they were not justified in getting scared. I think after they got these colds each of these two men decided that he didn’t want to pursue the remainder of this voyage and he was willing to suffer the consequences of wrongful termination by him of his part of the contract in order for him to escape the performance by him of the remainder of his contract for that part of this voyage from Skagway to Texas ports. These men did not turn out to have any serious health conditions that could not have been properly treated and dealt with if they had remained on board the Clove Hitch, where they were supposed to serve pursuant to their articles. The Court does not believe that the ship was not provided with sufficient medicine kit to take care of any ordinary colds conditions.

⁸Page 3 of the Apostles on Appeal in the *Humes* case, No. 12,038, in the records of this Court.

The conduct of these two petitioners, Mr. Humes and Mr. McKanna, during the next two to five days after they left the Clove Hitch, at Skagway, does not justify the contention of either one of them that the facilities on board the Clove Hitch for treating their colds were inadequate. Mr. Humes took an airplane to Seattle. He did not call upon a doctor immediately upon coming to Seattle nor go to a hospital in Seattle. He went home and went to bed, and stayed there from Thursday until Monday, and then he went to see a doctor. He could have done the same thing aboard the Clove Hitch. He could have stayed in his bunk or he could have gone to sick bay. There isn't any question in my mind on the proof here that there was an adequate ship's bay provided on the vessel.

So far as the Petitioner McKanna is concerned, he went on board the Princess Nora as a passenger and he went to his room where he stayed for about three days while the vessel was proceeding to its destination in Vancouver, B.C., and that he got some medicine from the stewardess during that voyage. He did not do anything more in the treatment of his cold for virus X or whatever it was he had than he could have conveniently done if he had stayed on board the Clove Hitch."

The decision in the *Humes* case is strikingly applicable here, and so also is the unreported decision in *Petition of England*, W.D. Wash. No. 16,347 (printed in Appendix C). Here neither drinking nor "nerves" nor the two in combination can stand as justification for Appellee's leaving his vessel or excuse for his desertion.

3. The action of the Coast Guard has no bearing on this proceeding

The court below repeatedly referred to the Coast Guard Proceedings, brought under R.S. 4450 (as amended, 46 U.S.C. § 239), with reference to Appellee's seaman's document (R. 29, 30, 33, 34). At one point (R. 34) the court states that it will "incorporate the findings of the Coast Guard" and we would infer from other references that these were understood to be findings of desertion. At the same point and elsewhere (R. 30) the court refers to penalties by the Coast Guard as, in effect, a reason for not complying with the law with respect to forfeiture of wages. All these references to Coast Guard proceedings, whether for one motive or another, are improper and if competent evidence of Coast Guard findings had been offered, which it was not, it would not have been admissible in evidence. *The Charles Morgan*, 115 U.S. 69, 77 (1885); see *Steward v. Atlantic Refining Co.*, 240 F.2d 715, 1957 A.M.C. 222 (3rd Cir.). Whether the court follows the Coast Guard findings or holds one way because the Coast Guard held the other, the reference to Coast Guard proceedings is wrong. It is the independent judgment of the court to which the parties are entitled.

III. THE COURT BELOW COMMITTED OTHER PROCEDURAL ERRORS AS TO WHICH IT SHOULD RECEIVE GUIDANCE

A. The Procedure of the Court Below in Hearing These Cases too Hastily for Investigation and Preparation Falls Short of Due Process

This case was called up for hearing below, as though it were a mere motion, five days after the filing of the

Petition, under a standing Order In the Matter of Hearing of Petitions by Deserting Seamen for Return of Wages and Effects, which reads as follows:

ORDERED that on and after September 1, 1954, the hearing of petitions filed by deserting seamen for the return of wages and effects be held before the Master Calendar Judge on the third day following the service of a copy of such petition on the United States Attorney for this District.

Such peremptory hearing allows no time for investigation of existing records even, to say nothing of learning non-record facts and securing testimony, and yet makes it necessary for the United States to oppose many petitions which may be meritorious, simply because their merits cannot be determined. Only in the court below is such peremptory procedure used. The other districts on this coast follow a settled practice of setting hearings not less than 60 days from filing, by analogy to the rules applied to Government pleadings in other cases.⁹

⁹In the Western District of Washington the court files in the unreported cases from that district referred to in footnote 5, *supra*, show that 60 days or more is always allowed. This is pursuant to a standing order in the clerk's office, entitled "Procedure for the Return of Wages and Effects of Deceased or Deserting Seamen" which provides that the return day of process "must be sufficiently in advance to assure the United States of 60 days notice of the hearing." In the District of Oregon, the court files in the cases of *Petition of Gray*, *supra*, footnote 5, and *Petition of Joffern*, No. 9804, show the practice of allowing 60 days or more to plead and of giving substantial time thereafter, if necessary, to obtain evidence. In the Southern District of California, the court files in the cases of *Petition of Bolak*, No. 2372-SE and *Petition of Richardson*, No. 2343, 1955 A.M.C. 842, show that in that district the United States is given as little as 30 days to plead with substantial time thereafter as necessary to obtain evidence before the trial.

Examination of the record in *Humes v. Alaska Transportation Co.*, 180 F.2d 534, 1950 A.M.C. 508, (No. 12,038) discloses that this Court is not guided by any arbitrary standard but is disposed to provide and to take the time necessary for a proper disposition of these cases. And as this Court has clearly indicated by its action in the recent case of *United States v. Staples*, 256 F.2d 290, 1958 A.M.C. 728 (9th Cir.), a desertion case on appeal from the Northern District of California, the requirements of law are not met when the United States is not given adequate time to investigate the case, to take discovery procedures if appropriate, and to determine whether it should avail itself of the testimony of witnesses who, in many cases, may be at sea or overseas.

These proceedings are not to be heard as though on motion but are to be set down in an orderly manner for regular trial upon competent evidence as in other cases. Cf. *United States v. Staples*, 256 F.2d 290, 1958 A.M.C. 728 (9th Cir.). Such a proceeding cannot be disposed of consistently with due process of law when only a few days are allowed for preparation. Such procedure is an invitation to perjury and fraud upon the court, and the court below should be advised to be guided by its own local Admiralty Rule 9, allowing 60 days in cases where the "United States is the respondent."

B. The Court Below Abused Its Discretion in Remitting a Portion of the Forfeiture Without Hearing the Cause

The Government has cheerfully recognized, in all cases like the present one, a discretion in the court to mitigate the forfeiture in appropriate cases, in the absence of explicit statutory power,¹⁰ in accordance with a time honored rule, which was well stated by Justice Story in *Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1192, No. 2,948 (C.C.Mass. 1844):

There are, without question, cases, where desertion will not be visited by a total forfeiture of wages, or quasi wages. But what are the cases to which the mitigation or compensation is applied? They are those, in which the party has a strong excuse, founded on gross misconduct or harsh usage on the other side; and where the party is, therefore, more in the situation of a victim than of a sinner; or where, having a locus poenitentiae, he has acknowledged his fault, and offered to return to duty within a reasonable time, and his services have been improperly rejected. It is to such cases, and cases of a similar nature, that the rule of compensation or mitigation is, in the benignity of the maritime law, fairly and justly and upon principles of public policy, applied.

¹⁰The Government has consistently urged, and the lower courts have accepted, that the courts, in exercising discretion to mitigate, should be guided by the standard of R.S. 4610, as amended (cf. 46 U.S.C. §711) that the forfeiture not be reduced "to less than one-third of its original amount." R.S. 4610 does not apply, of its own force, to proceedings like the present one, where the mode of recovery of the forfeiture is by direct payment from the master into Government accounts, but only to cases where, for one reason or another, it is necessary for the United States Attorney to bring suit against the seaman. Nevertheless, uniformity of discretion seems highly desirable and the Congressional standard expressed in R.S. 4610 is persuasive of what the limit of discretion should be.

Here, there is a total absence of all exculpatory and alleviating circumstances. The opportunity for repentance or return was given, and was not embraced; but was deliberately and obstinately refused. Under such circumstances, it appears to me, that this court would ill perform its duty, if it did not pronounce for a total forfeiture.

Not only is there an absence in this case of any of the "exculpatory and alleviating circumstances" which would be grounds for an exercise of discretion, but the court below, by deciding to remit before hearing the Government, indicated complete indifference to the existence of appropriate circumstances.

The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge, to a just result. (*Langnes v. Green*, 282 U.S. 531, 541, 1931 A.M.C. 511, 518.)

It surely requires no citation to convince the Court that a decision made, as here, without hearing the evidence in opposition, is arbitrary and an abuse of discretion.

C. The Action of the Court Below in Paying Out Funds From the Res While an Appeal Was Pending Was a Wrongful Invasion of This Court's Jurisdiction

From a Request for Admission of Facts (R. 17) which, as the Docket Entries (R. 93) show, produced

an admission by failure to answer, under Admiralty Rule 32(b), it appears that the funds ordered paid to Appellee at the first hearing were paid out despite the lower court's knowledge that an appeal had been taken. We should scarcely make a point of this, were it merely the result of inadvertence, rather than a continual problem, illustrated by this Court's record in the case of *United States v. Staples*, 256 F.2d 290, 1958 A.M.C. 728 (9th Cir.) (No. 15,730), where it was necessary to obtain an immediate stay order from Judge Healy and serve it upon the clerk below to prevent disbursement of the funds in an effort to frustrate appeal.

The taking of the appeal, by operation of law, vacates the decree and stays all proceedings below, including particularly any disposition of the res, and such disposition, after even a mere oral notice of appeal in open court, is wrongful. *The Rio Grande*, 23 Wall. 458 (1874). The lower court should be firmly reminded of this rule and of its application to the present class of cases.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decrees of the court below should be reversed and the court directed to enter a decree confirming the forfeiture and ordering the forfeited wages paid into the Treasury of the Fund for the Relief of Sick and Disabled and Destitute Seamen, in accordance with R.S. 4545 (as amended, 46 U.S.C. §628) (Appendix B), and that the court below should receive appropriate guidance as to the various errors specified.

Dated, San Francisco, California,
June 16, 1959.

GEORGE COCHRAN DOUB,
Assistant Attorney General

LYNN J. GILLARD,
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SAMUEL D. SLADE,
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(Appendices A, B and C Follow.)

Appendices.

Appendix A

TABLE OF EXHIBITS

EXHIBIT	IDENTIFIED	RECEIVED
Respondent's Exhibit No. 1 to Dep. of Sturdivant (Shipping Articles) (Read into record and withdrawn by consent)	40	15-16
Respondent's Exhibit No. 2 to Dep. of Sturdivant (Official Log) (read into record and withdrawn by consent)...	43	15-16
Respondent's Exhibit No. 2 to Dep. of Parker (page from Medical Log)....	66	15-16
Petitioner's Exhibit A to Dep. of Parker (Sketch)	83	15-16

Appendix B

Statutes Involved

R.S. 4596 (as amended, 46 U.S.C. 701) provides in pertinent part:

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

R.S. 4597 (as amended, 46 U.S.C. 702) provides:

Upon the commission of any of the offenses enumerated in section 701 of this title an entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner. In any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or

proof the court hearing the case may, at its discretion, refuse to receive evidence of the offense.

R.S. 4604, as amended (cf. 46 U.S.C. 706) provides:

All clothes, effects, and wages which, under the provisions of this title, are forfeited for desertion, shall be applied, in the first instance, in payment of the expenses occasioned by such desertion, to the master or owner of the vessel from which the desertion has taken place, and the balance, if any, shall be paid by the master or owner to any shipping commissioner resident at the port at which the voyage of such vessel terminates; and the shipping commissioner shall account for and pay over such balance to the judge of the district court within one month after the commissioner receives the same, to be disposed of by him in the same manner as is prescribed for the disposal of the money, effects, and wages of deceased seamen. Whenever any master or owner neglects or refuses to pay over to the shipping commissioner such balance, he shall be liable to a penalty of double the amount thereof, recoverable by the commissioner in the same manner that seamen's wages are recovered. In all other cases of forfeiture of wages, the forfeiture shall be for the benefit of the master or owner by whom the wages are payable.

R.S. 4545 (as amended, 46 U.S.C. 628) provides:

A district court, in its discretion, may at any time direct the sale of the whole or any part of the effects of a deceased seaman or apprentice, which it has received, and shall hold the proceeds of such sale as the wages of deceased seamen are held.

When no claim to the wages or effects or proceeds of the sale of the effects of a deceased seaman or apprentice, received by a district court, is substantiated within six years after the receipt thereof by the court, it shall be in the absolute discretion of the court, if any subsequent claim is made, either to allow or refuse the same. Such courts shall, from time to time, pay any moneys arising from the unclaimed wages and effects of deceased seamen, which in their opinion it is not necessary to retain for the purpose of satisfying claims, into the Treasury of the United States, and such moneys shall form a fund for, and be appropriated to, the relief of sick and disabled and destitute seamen belonging to the United States merchant marine service.

Appendix C

In the District Court of the United States
for the Western District of Washington
Northern Division

<p>In the Matter of the claim of John W. Strong, an alleged deserting seaman, for payment to him of his wages, Petitioner, vs. United States of America, Respondent.</p>	}	<p>No. 16378. Before Judge Bowen. Wednesday, May 14, 1958.</p>
<p>In the Matter of the claim of Mike Lydoff, an alleged deserting seaman, for payment to him of his wages, Petitioner, vs. United States of America, Respondent.</p>	}	<p>No. 16379.</p>

COURT'S ORAL OPINION

THE COURT: From a preponderance of the evidence of these two cases, the Lydoff case and the Strong case, and in respect to each and both of them, the Court finds, concludes and decides as follows:

That each of these petitioners as members of the crew of the СОНОСТОН signed valid and binding shipping articles to serve for approximately twelve months

for a voyage or series of voyages described in the articles, and about six months thereafter, on or about the 15th day of June, 1957, each of the petitioners knowingly, intentionally and willfully deserted the vessel at the Island of Guam and at his own expense by airplane from Guam to Los Angeles, an airport convenient to their American stateside homes.

That both of the petitioners were specifically reminded by the Master before they left the ship that at public expense they would be provided with adequate medical treatment and care which was available in Guam, and that they would be regarded as deserters if they left the ship under the circumstances, but they nevertheless proceeded with their plans and did violate the express provisions of their contract of service, the shipping articles, obligating them to the usual seaman's duties as members of the crew of the vessel, and they did lay themselves liable, each of them did, to the penalties of the law in respect to the willful and intentional desertion on the part of seamen members of a ship's crew.

It is true that each of the petitioners, as disclosed by the evidence, assigned his own particular illness as a reason for leaving the vessel, the petitioner Lydoff claiming that he was suffering from high blood pressure and the petitioner Strong claiming that he was suffering from bloody and protruding hemorrhoids;

That there is no question but that the Master, upon being advised by the petitioners of their intention to desert the vessel, offered to see that they received proper medical treatment and care without expense to

them in Guam at government facilities which had been recognized as adequate Naval medical facilities, maintained in part for the proper care and attention of American merchant seamen who might have occasion to be at the Island of Guam;

That notwithstanding such offer on the part of the Master, each of the petitioners persisted in his plan to intentionally and willfully desert the ship;

That the Court finds no extenuating circumstances in these facts.

Neither party to a ship's articles relating to a seaman's service on board the vessel has a right to repudiate that contract during the time it is in effect unless in the terms of the contract itself they reserve the express right to change it and, for example, shorten the work period. No such reserved method of termination is advanced here in behalf of the petitioners, nor is there any evidence before the Court that the petitioners had a right under the contract itself or any other conceivable right to terminate their contract under the shipping articles at the time they deserted the ship.

In view of the extreme solicitude expressed by the Master for these men and for their proper medical care, the Court is unable to find any extenuating circumstance making less aggravated the desertion of the ship by each one of the petitioners, and in particular the Court is unable to find here any such extenuating circumstance that would compare with the seaman's drunkenness that may have been the excusable circumstance regarded by the Court as extenuating in the

Mitchell case, 84 Fed. Supp. 871, where a seaman deserted the ship and where the Court mitigated a portion of the forfeiture of wages;

That this is one of the most inexcusable ship desertions by crew members I have ever seen or had called to this Court's attention during my service here. Everyone has a warm spot in his heart for American seamen who risk the vicissitudes of a voyage, but many a seaman long before we had refrigeration on ships for all food and long before we had electric fans on board ships, long before we had proper ventilation and proper sleeping and dining quarters on board ships, as was the case in the oldtime sailing ship days honored in our early American history, when men signed on these sailing ships as members of the crew and stayed with those ships even though troubled by illnesses a great deal more aggravated than those with which these men were afflicted.

As to petitioner Strong, there was no unusually dangerous condition as to his hemorrhoids. Many men at the height of their working seasons experience protruding bloody piles or hemorrhoids and continue with their work with the aid of simple localized treatments.

And referring to the high blood pressure which the petitioner Lydoff contends he had, there was nothing alarming about that, and the outside and room temperature conditions of his work might have been expected to have caused occupational increase in his blood pressure to the extent noted by the private doctors who examined him. For a young man of his general health and strength it was wholly inexcusable

to leave the ship, just as it was in the case of petitioner Strong, refusing adequate proper medical care and attention which was offered him by and on behalf of the ship and merely to accomplish some alleged desire to have his own physician treat him;

That it is the finding, conclusion and decision of the Court that the steamship company turned in no gear of the seamen to this Court and that each of the petitioners took all of his personal effects, gear and belongings with him when he deserted the ship, and that each of the petitioners has forfeited and does forfeit all of his unpaid wages deposited by the Shipping Commissioner in the registry of this Court and which is now subject to the order of this Court.

It is ordered that the Clerk of this Court forthwith pay to the Treasury of the United States for the Fund for the Relief of Sick, Disabled and Destitute Seamen, in the case of *In re Lydoff*, the sum of \$944.65, and, in the case of *In re John W. Strong*, the sum of \$1,292.27.

In view of that disposition of the case the Court sees no point to allowing to any litigant in this case any costs, because all of the funds available to pay costs have by this order been exhausted and there are no further funds in the Court's registry from which to pay costs, so it is the order of the Court that each one of the litigants in each case pay his own costs, neither recover any costs against the other.

In the District Court of the United States
for the Western District of Washington
Northern Division

Ray W. England,		No. 16347.
	Libellant,	Before
vs.		Judge Bowen.
United States of America,		Monday,
	Respondent.	Nov. 24, 1958.

COURT'S ORAL OPINION

THE COURT: From a preponderance of the evidence in this case the Court finds, concludes and decides as follows:

That the libellant in this case is a very intellectually bright and keen minded man, and is in possession of all of his normal faculties so far as attending to his own business and being legally responsible for his own voluntarily entered upon contracts are concerned, just like any other honest citizen is or should be.

That he signed these shipping articles calling for service on board this ship, one of America's modern merchant ships, which contemplated going and did go into oriental waters where the temperature is rather unpleasantly high, it being very warm from the point of view of some person living in a more temperate zone like Seattle.

That after he got there or in that vicinity he got some foreign particle in his ear,—he called it a chip of

rust—, received in the course of his seaman's work, and then he says, and the Court has no other information from which to believe differently and the Court does believe, that he contracted an inflammation in his outer ear that needed medical attention.

That he did receive such medical attention and the ship furnished it and acted reasonably in the discharge of the shipowner's responsibility to provide medical attention, and the ship did provide reasonably competent medical attention in line with the usual conduct of this and other steamship lines.

That nevertheless the libelant was dissatisfied with that and his ear did not clear up, and the libelant absented himself from his duties on board the ship on the pretense that he continued to be unfit for duty, not only at the time the doctor certified that he was unfit for duty, but he continued later on to in effect assert that he was not fit for duty and took it upon himself to decide that question. But after deciding that he needed to be away from the vessel for reasons of his health, he did not do anything about treating his health for a substantially lengthy period, in one instance three days, when he might just as well have done so. There was no paucity of medical assistance available upon his own selection at Calcutta, the port where he was, and there was no reason why the shipowner could not provide further medical assistance at the place where he was if he had applied for it and in case the master reasonably thought he should have it.

That thereafter he also decided for himself without yielding to the master's authority in the matter to

leave the ship and to decide for himself that he had a right to break his shipping articles and return to the States. He did that against the consent and will of the master and shipowner and did on his own account by airplane fly back to the United States and Seattle where he sought some medical attention at the U. S. Public Health Service Hospital as an outpatient.

That in doing these things and in accomplishing the interruption of his service to the ship, the libelant did willfully and knowingly and designedly desert this ship and that he had no justification in fact or in law for doing so, and he is liable and his property is liable for the reasonable consequences of such desertion.

That, however, the Court believes under all the circumstances, particularly because at one time at least one doctor had said that he was in need of medical treatment and was at that time unfit for duty, and because the Court believes that his outer ear inflammation did not entirely get well, the Court feels that some mitigation of the damages should be allowed on account of such consideration, and the Court does find that it would be equitable and just in this admiralty action involving only the unpaid wages of a seaman who was logged as a deserter and whom the Court believes and does find that he was as he was logged, a deserter, should have relief from the full loss of his wages, and the Court finds, concludes and decides that a fair and just sum which should be deducted from the amount of the wages lawfully payable to him would be one-half of the unpaid wages, and that the balance of his withheld wages should

forthwith be paid to him, and the Court will settle and enter a proper order upon proper findings and conclusions ordering the Clerk to pay out of the registry of the Court one-half the sum held in this case for the account of this deserting seaman, and the other half should be turned over under the statute for the relief of disabled seamen.

